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Nos. 81-150 and 81-546

In the Supreme Court of the United States

OCTOBER TERM, 1981

NORTHERN PIPELINE CONSTRUCTION CO., APPELLANT

v.

MARATHON PIPELINE CO., ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

MARATHON PIPELINE CO., ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF FOR THE UNITED STATES

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1. a. The gist of appellee's argument is the following (Br. 18-19): (1) when Congress creates an inferior court that exercises "the judicial power of the United States," it must confer on the judges of that court the tenure and salary guarantees of Article III, and (2) because the Bankruptcy Reform Act of 1978 gives bankruptcy courts jurisdiction over "case[s] arising under federal law," those courts exercise "the judicial power of the United States," and hence Congress' failure to invest them with tenure and salary guarantees violates Article III.[1] This simple analysis, however, which suggests that

[1] Appellee asserts (Br. 15-16) that Article III "serve[s] the concepts of both federalism and separation of powers." Whatever the merits of this statement, it is clear that appellee's argument

the exercise by the bankruptcy courts of both plenary jurisdiction and their traditional summary jurisdiction violates Article III, is belied by numerous decisions of this Court. Concededly, cases within the jurisdiction of the bankruptcy courts "arise under federal law" and thus fall within the class of cases to which the judicial power of the United States extends.[2] As explained in our opening brief (Br. 15-18), however, this Court has repeatedly held that a "legislative court"—one whose judges do not enjoy the tenure and salary guarantees of Article III—may exercise jurisdiction over cases to which the judicial power of the United States extends. In *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828), this

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here rests solely on the specific language of Article III; the Bankruptcy Reform Act plainly does not violate any constitutional principles of federalism or separation of powers.

The extension of bankruptcy court jurisdiction does not implicate any federalism considerations. Many of the plenary suits that fall within the jurisdiction of the bankruptcy courts will involve questions of federal law. State cases can be brought within their jurisdiction only if they are connected with the underlying bankruptcy, and those cases could have been brought into federal court even prior to the enactment of the Bankruptcy Reform Act. See, *e.g.*, *Schumacher* v. *Beeler*, 293 U.S. 367 (1934). By the same token, it is beyond doubt that the appointment of judges by the President to 14-year terms does not present any separation of powers problem. Indeed, the separation of the branches of government is even stronger in one sense in the case of bankruptcy courts—after 1984 bankruptcy judges will be subject to removal from office for incompetence, misconduct, or disability by the judicial council of the circuit (28 U.S.C. (Supp. III) 153), whereas Article III judges are subject to impeachment by Congress. *Cf. United States* v. *Raddatz*, 447 U.S. 667, 685 (1980) (Blackmun, J., concurring).

[2] Contrary to amicus curiae's unsupported assertion (Amicus Br. 11-14), the government has already made clear in its opening brief (Br. 18 & n.12) that it does not urge this Court to adopt the view espoused by Justice Jackson in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949), namely, that bankruptcy jurisdiction does not arise under federal law within the meaning of Article III. (All references to "Amicus Br." are to the brief filed by Beneficial Corporation.)

Court held that a non-Article III territorial court could exercise admiralty jurisdiction, which explicitly falls within the "judicial power of the United States" as described in Article III. And the power of "legislative courts" to adjudicate cases arising under federal law consistently has been reaffirmed in the case of military courts, District of Columbia courts, and specialized courts, such as the Court of Claims.

b. Rather, the rule established by this Court is that, pursuant to its plenary legislative powers, Congress in certain circumstances may establish specialized courts that do not meet the tenure and salary requirements of Article III.[3] Such is the case here. Pursuant to its bankruptcy power under Article I, Section 8, Clause 4, Congress has the authority to pass laws dealing with the subject of bankruptcy. That power includes the authority to establish legislative bankruptcy courts if warranted by a particularized need.

Appellee raises two arguments against the validity of a legislative bankruptcy court. First, appellee contends (Br. 33-44) that legislative courts may be created only if they are substantially similar to those courts whose validity has already been upheld by this Court. In particular, appellee contends (Br. 33-38) that the Article III guarantees apply only to courts created within the states and thus that the existence of legislative courts in the territories and in the District of Columbia is essentially irrelevant to the question presented here. This distinction, however, does not withstand analysis. Ar-

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[3] Because most of Congress' legislative powers are contained in Article I, these courts are sometimes called "Article I courts." The same reasoning, of course, applies to plenary legislative powers of Congress found in other Articles of the Constitution. For example, Congress' power to establish territorial courts, which our opening brief mistakenly ascribed to Article I (Br. 17), derives from its authority in Article IV, Section 3, to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

ticle III contains no limitation suggesting that its provisions are inapplicable to federal courts created outside the states, and this Court has never suggested any such limitation. Moreover, several other courts created within the states—the military courts, the Customs Court, the Court of Claims and the Tax Court—have been held to be valid legislative courts.[4]

Indeed, any distinction between bankruptcy and other areas over which the Constitution confers lawmaking power on Congress cuts in favor of the constitutionality of the Bankruptcy Reform Act. This Court has long held that Congress may create courts to adjudicate cases arising under federal law that do not contain the tenure and salary guarantees of Article III, and that authority is not restricted to Congress' legislative power over federal enclaves. More than any other legislative power—and totally unlike most—the authority to "establish * * * uniform Laws on the subject of Bankruptcies" is an authority that by its very nature contemplates the resolution of private disputes. Given this fact, bankruptcy is the single legislative subject area over which Congress'

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[4] Appellee contends (Br. 38-43) that the validity of these courts is irrelevant here because their jurisdiction and powers are more limited than those of the bankruptcy courts. While there are differences, of course, between these courts and the bankruptcy courts, the notion that they are any less "courts" than the bankruptcy courts is fanciful. The Tax Court and the military courts have subpoena power and the power to punish contempt by imprisonment (see 26 U.S.C. 7456; 10 U.S.C. 847, 849), and their judgments are final unless set aside on appeal (see 26 U.S.C. 7481, 7485; 10 U.S.C. 857, 867, 871, 876). Plainly, these attributes of judicial power do not disqualify a court from being constituted as a legislative court; indeed, even administrative agencies exercise similar powers. See *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 363 (1965); *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, 334-335 (1932). While the existing legislative courts may lack certain powers that have been identified as key attributes of "judicial power"—the power to enjoin other courts and a broad contempt power—those powers also have been withheld from the bankruptcy courts (see U.S. Br. 38-39).

determination that non-Article III courts are needed should be given greatest deference.[5]

Second, appellee suggests (Br. 20, 44-46) that Article III would be obliterated unless legislative courts are restricted to those contexts in which their validity has already been upheld by this Court. This is simply not so. Legislative courts may be created only pursuant to a specific legislative power.[6] Moreover, even pursuant to a specific grant of legislative authority, Congress' power to create such courts is not unfettered. As this Court explained in *Palmore* v. *United States*, 411 U.S. 389, 407-408 (1973), the requirements of Article III are generally the norm where affairs of national concern are at stake, but those requirements must give way *in proper circumstances* to accommodate Congress' plenary power to legislate with respect to specialized areas. This accommodation of Congress' legislative powers and the tenure and salary requirements of Article III balances competing constitutional interests and preserves an im-

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[5] Although appellee correctly states (Br. 15) that the salary and tenure provisions of Article III were intended to protect the independence of the judicial branch from the other branches of the federal government, it distinguishes legislative courts such as the Court of Military Appeals and the Tax Court from bankruptcy courts on the ground that the former "adjudicate matters arising between the Government and others" (Br. 38), rather than purely private disputes. Hence, according to appellee, Congress has more latitude to establish courts that do not enjoy Article III protections in precisely those situations (*i.e.*, where another branch of government is a party) where the protections would appear to be most essential. This Court has never suggested such an illogical rule. See, *e.g.*, *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 15 (1955).

[6] Appellee's failure to recognize this limitation is highlighted by its suggestion (Br. 33-34) that *American Insurance Co.* v. *Canter*, *supra*, refutes the view that Congress' power to establish legislative courts extends beyond the territories. *Canter* upheld the exercise of jurisdiction over admiralty cases in the territories because of Congress' power to legislate for the territories. There was no constitutional grant of legislative power that would have authorized Congress to create non-Article III courts to hear common law admiralty cases in the states. Here, of course, the bankruptcy courts are established pursuant to Congress' bankruptcy power.

portant role for the Article III protections. As Professor Wechsler stated in his letter to the House Judiciary Committee:

> [The *Palmore*] principle appears to me to place the proper values in the balance. The commitment of Article III, § 1 to permanent and tenured courts must be respected generally in creating jurisdiction to enforce laws of national applicability but the mandate may be relaxed by interpretation in light of "particularized needs" perceived by Congress in special areas of legislative competence to warrant such "distinctive treatment."

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 86 (1977).[7]

2. As explained in our opening brief (Br. 23-33), and contrary to appellee's contention (Br. 46-48), Congress correctly found that there existed a particularized need for a specialized bankruptcy court exercising plenary jurisdiction.[8] The basis for Congress' power to create a

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[7] Contrary to appellees' assertion (Br. 20, 28-31), neither the government's position nor the *Palmore* formulation suggests that the federal district courts could be constituted without the protections of Article III. Courts with general federal question jurisdiction are not confined to a specialized area of legislative competence. Indeed, the text of Article III supports the view that its protections are particularly applicable to courts vested with general federal question jurisdiction. The tenure and salary protections apply to courts in which the judicial power of the United States is "vested," and that power extends to "*all* Cases" enumerated in Article III. Thus, a court of limited jurisdiction has not been "vested" with "the judicial Power of the United States" in the sense that a court of general jurisdiction has.

[8] Amicus incorrectly states (Amicus Br. 7-8) that the Bankruptcy Reform Act strips the new bankruptcy courts of their administrative functions. While their administrative role has been reduced by the new Act, the new bankruptcy courts retain certain administrative functions. See, *e.g.*, 11 U.S.C. (Supp. IV) 327, 330, 350, 363, 364, 701, 1108. The quotation from the House Report reproduced by amicus (Amicus Br. 8) refers only to those few districts in which United States Trustees have been established as part of a pilot program. Even in those pilot districts, under the Act as

legislative court is particularly strong in the bankruptcy context. First, of course, the specialized nature of bankruptcy proceedings has long been recognized, and bankruptcy cases historically have been handled by special non-Article III judges or referees, albeit technically under the auspices of the district court. Moreover, unlike many of Congress' plenary powers, the power to establish laws on the subject of bankruptcies clearly contemplates the resolution of disputes between private parties, and it is only reasonable that the bankruptcy power include the power to establish a mechanism to resolve those disputes. And, as explained in detail in our opening brief (Br. 27-31), Congress found that it was essential to a workable bankruptcy system to vest these specialized bankruptcy courts with plenary jurisdiction.[9]

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passed, bankruptcy judges continue to perform the administrative functions that are not explicitly excluded by 11 U.S.C. (Supp. IV) 15103(f).

[9] Amicus contends (Amicus Br. 10) that the venue provisions of the Act do not advance the goal of centralization of bankruptcy proceedings, but that contention is based on a misreading of the statute. The statute generally provides that "a proceeding arising in or related to a case under title 11 may be commenced in the bankruptcy court in which such case is pending." 28 U.S.C. (Supp. III) 1473(a). There are two limited exceptions to this rule: (1) suits brought by the trustee for small sums—less than $1,000 or, in the case of consumer debt, less than $5,000; and (2) suits brought by the trustee based on a claim that arose after the commencement of the bankruptcy proceeding. 28 U.S.C. (Supp. III) 1473(b), (d). In addition, Sections 1473(c) and (e) grant a plaintiff the option, in certain limited circumstances, to bring suit in a district other than the district in which the bankruptcy proceeding is pending. Moreover, a bankruptcy court has the power to transfer a case to another district in the interest of justice and convenience. 28 U.S.C. (Supp. III) 1475.

Both amicus (Amicus Br. 9, 24) and appellee (Br. 7) mischaracterize the Act's removal provision, 28 U.S.C. (Supp. III) 1478. Only a party, not the bankruptcy court, has the power to remove a case. If a party does seek removal, the bankruptcy court is empowered to remand the case back to the district court for equitable reasons. It is only this decision whether or not to remand that the statute makes nonreviewable. See 28 U.S.C. (Supp. III)

Certainly appellee's argument (Br. 15-17) that the Framers intended that the requirements of Article III apply to suits that would otherwise be heard in state court has no application here. The bankruptcy power is one that is peculiar to the federal government. While the states may enact legislation concerning some aspects of insolvency if there is no federal law on the subject, other important aspects of bankruptcy legislation—for example, the discharge of a debtor's obligation—are completely beyond the power of the states because the states are forbidden to pass legislation that impairs the obligation of contract. See *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 196-208 (1819). Thus, the resolution of disputes under the federal bankruptcy laws is not a matter that would generally be committed to the state courts for decision.

3. Appellee contends (Br. 21-23) that *United States* v. *Raddatz*, 447 U.S. 667 (1980), establishes that the bankruptcy courts fail to satisfy Article III because they are not under the "total control" of an Article III court. This contention, which suggests that the 1973 Bankruptcy Rules adopted by this Court were similarly unconstitutional, is insubstantial. First, *Raddatz* upheld a provision of the Federal Magistrates Act, 28 U.S.C. 636(b)(1), against an Article III challenge, and, although the Court relied in its decision on the degree of control exercised by the district court, the Court carefully refrained from expressing any opinion on whether the final decision on a suppression motion could be made by a non-Article III magistrate. 447 U.S. at 681. In any event, *Raddatz* is inapposite here because it concerns the rights of criminal defendants—an area where the Court has shown a special solicitousness for the tenure and salary guarantees of Article III. See, *e.g.*, *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955). Indeed, even

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1478(b); H.R. Rep. No. 95-595, *supra*, at 51. In any case, as noted in our opening brief (Br. 28 n.21), the expanded jurisdiction of the bankruptcy courts can be expected to account for only a small portion of those courts' business, which primarily will be routine bankruptcy matters.

Justice Marshall's dissent in *Raddatz*, upon which amicus places great reliance (Amicus Br. 14, 17-18), goes no farther than contending that a criminal suppression hearing is "one of the admittedly few contexts in which independent factfinding by an Art. III judge is constitutionally required." 447 U.S. at 712. Thus, it is clear that *Raddatz* casts no doubt on the rule of *Crowell* v. *Benson*, 285 U.S. 22 (1932), that factfinding by a non-Article III officer in a civil case, subject to appeal to an Article III court, may satisfy the requirements of Article III (see U.S. Br. 40).[10]

4. Appellee asserts (Br. 24-28) that the Bankruptcy Reform Act made constitutionally significant changes from the prior practice, but in fact, as pointed out in our opening brief (Br. 41-45), no such changes were made. The only change of any significance in the relationship between the district court and the bankruptcy court was the elimination of the district court's infrequently exercised power to withdraw a reference from a

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[10] Appellee's contention (Br. 30) that Justice Harlan's plurality opinion in *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), contradicts this rule is wrong on several counts. *Glidden* involved two separate cases—one in which a Court of Claims judge sat by designation on a court of appeals panel and one in which a judge of the Court of Customs and Patent Appeals presided over a criminal trial. Justice Harlan explained why it was necessary for the Court to reach the question whether these judges were Article III judges, and those reasons do not cast any shadow on the holding of *Crowell*. In the first case, it was clear that the court of appeals panel would have been defective if the judge sitting by designation were not an Article III judge. Because the case was within the diversity jurisdiction of the federal court, there was no conceivable basis for the exercise of jurisdiction by a legislative court. 370 U.S. at 537. See U.S. Br. 22. Moreover, there was no right of appeal from the court of appeals' decision. With respect to the second case, which is in any event distinguishable because it was a criminal case, Justice Harlan carefully stated that he expressed no view as to the correctness of the decision below that the trial could constitutionally have been conducted by a non-Article III judge. 370 U.S. at 538. See *Palmore* v. *United States*, *supra*, 411 U.S. at 405-406 n.13.

bankruptcy judge pursuant to Bankruptcy Rule 102(b). See generally Advisory Committee Note to Bankruptcy Rule 901(7). It had long been established under the old Act that the order of a bankruptcy referee, who was included by the statute within the definition of the bankruptcy court (11 U.S.C. 1(9)), was final, unless an appeal was taken within 10 days. See 11 U.S.C. 67(c); S. Rep. No. 1689, 80th Cong., 2d Sess. (1960). And those orders in adversary proceedings were enforceable pursuant to Fed. R. Civ. P. 69. See Bankruptcy Rule 769. While appellee correctly states (Br. 23) that filing of papers, discovery, and other matters are now under the bankruptcy court's control, this represents no change from the practice prior to the enactment of the Bankruptcy Reform Act. See Bankruptcy Rules 509(a), 701 *et seq.* With respect to plenary jurisdiction, appellee recognizes (Br. 27-28) that *MacDonald* v. *Plymouth Trust Co.*, 286 U.S. 263 (1932), found no constitutional bar to the decision by a non-tenured referee of cases transferred with the consent of the parties (see U.S. Br. 44-45).

In sum, the thrust of appellee's contention is not only that the vesting of plenary jurisdiction in the bankruptcy courts is unconstitutional, but also that the exercise of traditional summary jurisdiction over bankruptcy matters by those courts, or by referees as they operated under the Bankruptcy Rules adopted by this Court in 1973, is unconstitutional. Under appellee's interpretation of Article III, Congress apparently must either confer primary responsibility for bankruptcy matters upon the district courts—a course of action that Congress has already said would be unworkable (see U.S. Br. 24-25)—or confer the Article III salary and tenure guarantees upon the bankruptcy judges, which would swell the ranks of the tenured judiciary enormously. Article III does not compel such a choice. The Bankruptcy Reform Act is constitutional both because the particularized need for a special bankruptcy court warrants the establishment of a legisla-

tive court and because that court has been established as an adjunct with limited powers subject to appeal as of right to an Article III court.[11]

For the foregoing reasons and the reasons set forth in the government's opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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APRIL 1982

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[11] Appellee's repeated reference (Br. 3-4, 31, 33, 45) to a letter from the Department of Justice to Congress concerning the provisions of the original House bill is puzzling. This letter and accompanying memorandum, which is not mentioned in any of the congressional reports, does not suggest that the Bankruptcy Reform Act is unconstitutional. The memorandum expresses doubt whether all of the powers conferred on the bankruptcy courts by the bill can constitutionally be conferred upon a legislative court, although it states that those powers can be conferred upon bankruptcy judges who are adjuncts to the district court. The House bill was later amended to delete those powers of the bankruptcy court that had caused the most constitutional concern (see U.S. Br. 38), and the bankruptcy courts were changed to be adjuncts to the district court. Attorney General Bell testified on behalf of the Justice Department that the Senate bill incorporating these changes was constitutional. *Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 544 (1977).

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